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No. 86-1295

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ASHLAND OIL, INC.,
Appellant,
v.
HERSCHEL H. ROSE, III,
STATE TAX COMMISSIONER OF WEST VIRGINIA,
Appellee.

On Appeal from the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT AND BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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The Committee on State Taxation of the Council of State Chambers of Commerce hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the Attorney for the Appellant has been obtained. The consent of the Attorney for the Appellee was requested and refused.

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 41 Chambers of Commerce. The Committee on State Taxation (COST), one of the three advisory committees of the COUNCIL, consists of 258 corporate members which conduct a substantial portion of the interstate commerce of United

States taxpayers. One of COST's principal activities has been to work with the states and others toward developing fair and equitable standards of state taxation. Member companies of COST are representative of that part of the Nation's business sector which is most directly affected by state taxation of interstate operations. COST is, therefore, vitally interested in cases such as this one which deprive taxpayers of the constitutional guarantees of due process and equal protection under the Fourteenth Amendment.

In this case, West Virginia seeks to give prospective effect only to this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), invalidating the state's wholesale gross receipts tax as unconstitutionally discriminatory under the Commerce Clause. Thus, the State seeks to retain the discriminatory taxes assessed and collected prior to this Court's *Armco* decision, except as to the taxpayer therein, thereby reaping the benefits of those revenues collected under the unconstitutional law. A substantial number of COST members are among those taxpayers which are adversely affected by the prospective ruling of the court below since the right to recovery of these illegally-exacted taxes pursuant to the refund statute provided by the state legislature is effectively extinguished. If permitted to stand, the finding of unconstitutional state taxation by this Court in *Armco* would thus become meaningless as to these many taxpayers.

Furthermore, an increasing number of states in recent years have determined that judicial decisions invalidating unconstitutional state taxes should be applied prospectively. In *First of McAlester Corp. v. Oklahoma Tax Commission*, 709 P.2d 1026 (Okla. 1985), the Oklahoma Supreme Court applied its decision invalidating the state bank tax as unconstitutional under *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983), prospectively only from January 24, 1983, the date of this Court's decision.

In *Midland Bank & Trust Co. v. Olsen*, 717 S.W.2d 580 (Tn. 1986), the issue of prospective/retrospective application arose when the Commissioner of Revenue "implie[d], without presenting any argument or authority," 717 S.W.2d at 583, that allowing the refund of the taxpayers' 1982 corporate excise taxes required retroactive application of the *Memphis Bank* decision. The court held, however, that the refunds mandated by *Memphis Bank* did not involve the retrospective application of that decision since the taxpayers' cause of action did not accrue until the 1982 taxes were due and paid under protest which occurred after the decision was rendered. The issue of retroactive application of this Court's *Memphis Bank* decision for tax years earlier than 1982 was expressly reserved by the Tennessee Supreme Court.

In another instance where an unconstitutional taxing scheme was found under this Court's *Memphis Bank* decision, the state and the city differ in their application of the state court of appeals decision. The City of New York has taken the position that the decision in *Matter of Forbes, Inc. v. Department of Finance*, 487 N.E. 2d 252 (N.Y. Ct. App. 1985), *cert. denied*, —— U.S. —— (Apr. 7, 1986) (No. 85-1371), invalidating the city's treatment of federal government obligations for general corporation tax purposes as discriminatory and unconstitutional, is to be applied prospectively from November 19, 1985, the date of the court of appeals decision. The State of New York, however, has announced its past policy of allowing refund claims for all open years.

Prospective effect which a North Dakota district court gave to its ruling as of the date of the recording of judgment was affirmed on appeal in *Metropolitan Life Insurance Co. v. Commissioner*, 373 N.W.2d 399 (N.D. 1985) in a case brought by several out-of-state insurance companies. Thus, while the taxpayers were successful in their challenge of the state's gross insurance premiums tax as unconstitutionally discriminatory under this

Court's decision in *Metropolitan Life Insurance Co. v. Ward*, 105 S. Ct. 1676 (1985), the prospective ruling effectively denied their claims for refund.

The issue of prospectivity has also been raised in a "test case" before this Court, *National Can Corporation v. State of Washington, Department of Revenue*, No. 85-2006, in which the Appellant interstate businesses are representative of more than 100 taxpayers engaging in interstate commerce who filed substantially similar actions in reliance upon this Court's decision in *Armco*. The Washington Department of Revenue has asked the Court, if its ruling is adverse to the State, to apply its decision prospectively in order to extinquish the taxpayers' rights to refunds. Brief for Appellee at 44-46.

Other states—including Ohio, New Jersey, Kentucky, New York, Florida and Arizona—have also denied refunds to taxpayers by giving a decisional state or local tax rule prospective operation only. *See OAMCO v. Lindley*, 27 Ohio St. 3d —— (1986), *aff'd on rehearing*, 27 Ohio St. 3d —— (1987); *Salorio v. Glaser*, 461 A.2d 1100, *cert. denied*, 464 U.S. 993 (1983); *Jacobs v. Lexington-Fayette Urban County Government*, 560 S.W.2d 10 (Ky. 1977); *Pellnat v. City of Buffalo*, 59 A.D.2d 1938, 399 N.Y.S.2d 788 (1977); *Hurd v. City of Buffalo*, 41 A.D.2d 402, 343 N.Y.S.2d 950 (1973), *aff'd*, 34 N.Y. 2d 628, 311 N.E.2d 504, 355 N.Y.S.2d 369 (1974); *Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla. 1973); *Southern Pacific Co. v. Cochise County*, 377 P.2d 770 (1963).

Until recently, the states and taxpayers alike have generally recognized the taxpayer's right to a refund or abatement of unconstitutionally exacted taxes. There is an emerging trend by some states to apply a judicial decision of unconstitutional state taxation only on a prospective basis, thereby allowing them to retain the financial benefit of the revenues collected under the unconstitutional law. However, it has long been established

that "[t]he retention by the state of an unconstitutional tax is as much a violation of the Constitution as was the collection of tax in the first instance. *See, Carpenter v. Shaw*, 280 U.S. 363, 369, 50 S. Ct. 121, 123, 74 L.Ed. 478 (1930)." *United States v. State Tax Commission of Mississippi*, 645 F.2d 4, 5 (5th Cir.), *cert. denied*, 454 U.S. 896 (1981). The purpose and effect of the rule of prospectivity adopted by the West Virginia Supreme Court is to deny the Appellant Ashland and all other taxpayers the remedy to which they are constitutionally entitled.

By this motion, COST seeks leave to show that this Court's decision in *Armco, Inc. v. Hardesty*, holding the West Virginia wholesale gross receipts tax to be unconstitutional, should apply retrospectively to prevent inequity and protect the constitutional rights of interstate corporate taxpayers.

COST therefore urges that leave be granted to file a brief as *amicus curiae* and respectfully so moves the Court.

Respectfully submitted,

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Dated: March 11, 1987

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INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of Appellant's Jurisdictional Statement in the above-captioned case.

INTEREST OF *AMICUS CURIAE*

The interest of the Committee on State Taxation of the Council of State Chambers of Commerce is set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae.*

SUMMARY OF ARGUMENT

This Court's decision in *Armco, Inc. v. Hardesty*, holding the West Virginia wholesale gross receipts tax to be unconstitutional, should apply retrospectively to prevent inequitable treatment as to all interstate corporate taxpayers.

ARGUMENT

The rule of limited retrospectivity that a change in law must, at a minimum, be given effect while a case is pending on direct review was established in *United States v. The Schooner Peggy*, 1 Cranch 103 (1801). While this principle was applied in *Schooner Peggy* where the intervening change in law involved a treaty, this same approach has been applied in cases where a change in law is made by statute, *Bradley v. School Board*, 416 U.S. 602 (1960); *United States v. Alabama*, 362 U.S. 602 (1960) (per curiam); *Ziffrin, Inc. v. United States*, 318 U.S. 73 (1943); *Carpenter v. Wabash Ry.*, 309 U.S. 23 (1940); by Constitutional amendment, *United States v. Chambers*, 291 U.S. 217 (1934); by judicial decision, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); *Moores v. National Bank*, 104 U.S. 625 (1882); and where the change in law is "constitutional, statutory or judicial", *Thorpe v. Housing Authority*, 393 U.S. 268, 282 (1969).

The rule of *Schooner Peggy* was noted as being applicable in both civil and criminal litigation in *Linkletter v. Walker*, 381 U.S. 618 (1965) when this Court adopted the first of its modern retroactivity tests for cases involving application of new constitutional rules. The three-prong test established therein applied to criminal litigation and required a "weigh[ing] of the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U.S. at 629.

A separate standard for governing questions of retroactive application of new rules of law in civil cases was enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Three factors were established as relevant in determining whether a decision should have nonretrospective effect:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard this operation. . . . Finally, we have weighed the inequity imposed by retroactive application for where a decision of this court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." (Citations omitted). 404 U.S. at 106-107.

Application of the retrospective standards of *Linkletter* generated incompatible rules and inconsistent principles and thus in *Griffith v. Kentucky*, 57 U.S.L.W. 4089 (U.S.L.W. Jan. 13, 1987), this Court adopted Justice Harlan's approach to retroactivity propounded in *Desist v. United States*, 394 U.S. 244, 256 (1969) (dissenting opinion) and in *Mackey v. United States*, 401 U.S. 667, 675 (1971). The Court held in *Griffith* that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final with no exception for cases in which the new rule constitutes a 'clear break' with the past." 55 U.S.L.W. at 4092. Thus, the Court has abandoned its efforts, at least in the area of criminal litigation, to deviate from the established principle under the *Schooner Peggy* line of cases that new rules of law should be applied retroactively to non-final cases.

While it was noted in *Griffith* that the area of civil retroactivity "continues to be governed by the standard announced in *Chevron Oil Co. v. Huson*," 55 U.S.L.W. at 4091, n.8, the rationale for eliminating deviating retrospective rules applies equally here. This Court rejected any exception for a new rule which is a clear break with the past for the same reasons that failure to apply a newly-declared rule to non-final cases violates basic norms of constitutional adjudication:

> "First, it is a settled principle that this Court adjudicates only 'cases' and 'controversies'. *See* U.S. Const. Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of the judicial review requires that we apply the rule to all similar cases pending on direct review."
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> "Second, selective application of new rules violates the principle of treating similarly situated defendants the same." 55 U.S.L.W. at 4091.

Indeed, Justice Harlan cautioned the Court in *United States v. Estate of Donnelly*, 397 U.S. 286 (1970) that certain distinctions suggested in civil cases, such as between clear and ambiguous statutes, decisions construing statutes for the first time, decisions overruling prior constructions of statutes, may lead the Court to a "retroactivity quagmire" similar to that which it has escaped in the criminal field. 397 U.S. at 295. In Justice Harlan's view, new rules of law should be applied retrospectively also in non-final civil cases, there being no justification for applying principles, constitutional or otherwise, determined to be wrong to litigants who are or may still come to court. Consistent with his approach to criminal retroactivity adopted by this Court in *Griffith*, "the un-

derlying substantive principle [is] that short of a bar of *res judicata* or statute of limitations, courts should apply the prevailing decisional rule to the cases before them." 397 U.S. at 297. Perhaps, it is again that time called for by Justice Harlan when " 'Retroactivity' must be rethought." 55 U.S.L.W. at 4091. The instant case provides the Court that opportunity.

CONCLUSION

For the foregoing reasons, COST urges this Court to note probable jurisdiction in the present case and give plenary consideration to the questions discussed in Appellant's Jurisdictional Statement.

Respectfully submitted,

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